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CHARLES ELMORE CROPLEY

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1951.

No. 507

ALFRED SYLVANUS, ARCADIA NATIONAL INSURANCE COMPANY AND VOYLE CLARK JOHNSON,

*Petitioners,*

*vs.*

THE UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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**No.** .....

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ALFRED SYLVANUS, ARCADIA NATIONAL INSURANCE COMPANY AND VOYLE CLARK JOHNSON,

*Petitioners,*

*vs.*

THE UNITED STATES OF AMERICA,

*Respondent.*

---

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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*To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:*

Alfred Sylvanus, Arcadia National Insurance Company and Voyle Clark Johnson, defendants in the trial court, and Petitioners here, pray that a writ of certiorari be issued by this Court for review of judgments (R. 938-939) entered in this case on December 1, 1951, by the Court of Appeals for the Seventh Circuit.*

*The opinion of the Court of Appeals appears at pp. 919-37 of the Record.

SUMMARY STATEMENT OF MATTERS INVOLVED.

**The Nature of the Case.**

The judgments of the Court of Appeals, sought to be reviewed, affirm a judgment of the United States District Court for the Northern District of Illinois, Eastern Division, entered on the verdict of a jury finding the Petitioners guilty: (1) of using the mails to execute a scheme to defraud by issuance of allegedly deceptive accident and sickness insurance policies, and by circulation and publication of allegedly misleading advertising matter relating thereto; and (2) of a conspiracy to commit the same offense. Sylvanus was sentenced to 3 years; the Insurance Company was fined $10,000; and Johnson was sentenced to 18 months.

The statutes under which the defendants were convicted are, so far as material, as follows:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises * * * shall for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement * * * in any post office * * * or authorized depository for mail matter, * * * or shall take or receive any such therefrom * * * shall be fined not more than $10,000, or imprisoned not more than five years, or both."
>
> Sec. 1341 (formerly 338), Title 18, U. S. C.

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both."
>
> Sec. 371 (formerly 88), Title 18, U. S. C.

The offense charged has two elements:

(1) The existence of a scheme to defraud by issuance of the fraudulent policies and advertising matter; and

(2) The use of (or conspiracy to use) the mails to execute the scheme.

While the use, or contemplated use, of the mails is what gives the Federal Court jurisdiction, the conviction depends on the existence of the fraudulent scheme which is to be executed by their use—in this case, on an adjudication by the Federal Court that the insurance policies and advertising matter are deceptive and misleading, so that their issuance and publication would constitute a fraud.

**The Basic Question of Federal Law Involved: Is This Prosecution Barred by the McCarran Act Delegating Exclusive Right of Regulation of the Insurance Business to the States, and Providing That No Act of Congress Not Specifically Relating to Insurance Shall Invalidate, Impair or Supersede a State Law Exercising That Right?**

The insurance policies and advertising matter on which the prosecution is based, were issued and published in the conduct of an insurance business regulated by a statute of Illinois, known as "The Illinois Insurance Code," the material provisions of which are set forth in Appendix 1, attached hereto. That statute prescribes the form of insurance policies to be issued; requires their approval by the State Department of Insurance before issuance; prohibits misleading statements in advertising; and prescribes penalties for its violation.

The insurance policies in suit were specifically approved in form and substance by the State Insurance Department (R. 171-2) and were issued pursuant to state authority.

The purpose and effect of the prosecution were thus to

convict the defendants, under the Federal statutes relating to mail fraud and conspiracy, for acts done in the conduct of an insurance business wholly regulated by state law. The result was, as we contend, to nullify and to supersede that law and the regulations imposed thereby, insofar as they relate to the insurance policies and advertising matter in suit.

By Act passed in 1945, known as "The McCarran Act" (Secs. 1011-1015, Title 15 U. S. C.), Congress declared that regulation of the insurance business by the states is in the public interest and that "no act of Congress not specifically relating to the business of insurance" shall be construed to invalidate, impair or supersede any law enacted by any state for the purpose of regulating the business of insurance."

The McCarran Act, so far as material, reads as follows:

> **"An Act to express the intent of Congress with reference to the regulation of the business of insurance.** [Laws of 79th Congress, 1st Session; Public Law 15.]
>
> "Sec. 1—Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of Congress shall not be construed to impose any barrier to the regulations or taxation of such business by the several States. [Sec. 1011, Title 15 U. S. C.]
>
> Sec. 2—(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) No act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance. * * * [Sec. 1012, Title 15, U. S. C.]"

The basic question in this case is whether, in view of the McCarran Act, this prosecution under the mail fraud and conspiracy statutes, or a similar prosecution under any Federal statute, not by its terms relating to the conduct of an insurance business, can be maintained—*i. e.*, whether or not the McCarran Act leaves to the states the right to regulate and control the conduct of an insurance business, and excepts from the application of every Federal statute (not expressly relating to insurance) all matters pertaining to an insurance business over which the state, by appropriate legislation, has assumed jurisdiction.

This question was raised in the District Court on motion to dismiss the indictment, which was overruled (R. 25, 27).

If the motion to dismiss had prevailed, the Government would have had the right to appeal directly to the Supreme Court (Sec. 3731, Title 18 U. S. C.). The defendants have no corresponding right of appeal, but the question of statutory construction involved is important and, we submit, should be passed upon by this Court. It relates to the method of regulation of, and the power to regulate, the business of all insurance companies throughout the country that sell insurance policies by mail and by public advertising, rather than by personal solicitation.

The decision of this Court is further called for because of the conflict in principle between the decision of the Court of Appeals of the Seventh Circuit here sought to be reviewed, and the decision of the Court of Appeals for the Eighth Circuit in *North Little Rock Trans. Co.* v. *Casualty Reciprocal Exchange,* 181 Fed. (2) 174 (Cer. Den. 340 U. S. 823), holding that the McCarran Act barred a suit to enforce the provisions of the Sherman Act (otherwise clearly applicable) for acts done in the conduct of an insurance business which was regulated by the Arkansas law, and therefore, by virtue of the McCarran Act, subject to exclusive state jurisdiction.

**The Parties.**

Arcadia Mutual Casualty Company was organized in 1938 by Petitioner, Alfred Sylvanus, and a group of associates. Sylvanus had been general agent of Minnesota Mutual Life Insurance Company. His associates were mostly school teachers and had not been theretofore connected with the insurance business (R. 159).

On October 1, 1945, Arcadia Mutual Casualty Company combined with another company to form Arcadia Life & Casualty Company under Article XVI of the Illinois Insurance Code (R. 399-400). On December 1, 1946, the articles of incorporation of the last-named company were amended and the name was changed to Arcadia National Insurance Company, defendant and Petitioner here (R. 400, 401).

Alfred Sylvanus was president of each of the insurance companies mentioned (R. 170).

The Company always maintained the required reserves and its financial condition was uniformly approved in the reports of examination of the Illinois Insurance Department (R. 768, 773, 775-6, 790-1, 807, 825).

Petitioner, Voyle Clark Johnson, became connected with the other defendants through execution on February 24, 1944, of the agency contract with Arcadia Mutual Casualty Company, whereby he became agent for sales of the "Security" or limited coverage policy (R. 458-468). Johnson operated his agency under the name of "United States Insurance Agency."

**The Alleged Scheme to Defraud.**

The supposed "scheme to defraud" was alleged (R. 2-3) to have been to induce prospective policyholders to buy one or the other of two sickness or accident policies, known as the "Security Policy," offering limited coverage and

the "American Sentinel Policy," offering comprehensive coverage.

The policies are set forth at page 469 of the record and are summarized in Appendix 2, attached.

The premium on each policy was $1.00 per month, or $11.00 per year. With two exceptions, all the policies involved in this suit were of the Security Policy type.

The policies were advertised by circulars and published advertisements, each offering to submit the policy advertised for examination. The policies were issued only on application to the Insurance Company by the policyholder. There was no personal solicitation.

The device by which it is alleged the fraud was to be completed, comprised two elements:

(1) The circulation or publication of advertisements (each asking prospects to send for the policies for examination) which were alleged to emphasize maximum benefits payable but to omit reference to qualifying limitations and exceptions that might reduce the benefits or result in denial of claims on the policies; and

(2) The issuance of the policies, which (although approved by the State as to both form and substance) were alleged to have been "cunningly worded" and composed "in an ambiguous manner," and otherwise to have been arranged and worded so as to mislead the policyholders or prospects to whom they were tendered (R. 8-10, 172).

Of the 22 policyholders testifying, only 7 identified any advertising seen before purchase of the policy.

The charge of fraud rests primarily, therefore, on the alleged deceptive character of the state-approved policies. There is no contention that claims were not paid in accordance with the policy provisions, or that anyone profited by the supposed fraud. The evidence shows that the supporters of the enterprise were continually putting money

into it through purchase of guaranty certificates (payable only from earned surplus after reserves for policyholders had been fully provided for) so that the Company should be adequately financed (R. 825). No money was withdrawn to pay those certificates. They were never paid (R. 185).

When the conviction of the Petitioners in this case made it impracticable for the defendant Insurance Company to carry on its business, arrangements were made with another company to take over outstanding policy liabilities so that no policyholder would suffer any loss (R. 48).

**The Insurance Policies and Advertising; the Comprehensive Nature of the Provisions of the State Law Relating Thereto; and the Supervision by State Authorities Under That Law.**

The material provisions of the Illinois Insurance Code regulating the conduct of the insurance business in Illinois are set forth in Appendix 1, hereto attached.

Section 143, of the Illinois Code, relating to issuance of insurance policies of the class here involved, is as follows (Ch. 73, Ill. R. S. Par. 755):

> "(1) No company transacting the kind or kinds of business enumerated in Class 1 of section 4 shall issue or deliver in this State a policy or certificate of insurance, * * * or use an application blank, in this State until the form and content of such policy, certificate, * * * or application blank has been filed with and approved by the Director. *It shall be the duty of the Director to withhold approval of any such policy,* certificate * * * or application blank filed with him *if it violates any provisions of this Code, contains inconsistent, ambiguous or misleading clauses, or contains exceptions and conditions that unreasonably or deceptively affect the risk purported to be assumed in the general coverage of the policy.* In all other cases

the Director shall give his approval. Failure of the Director to act within thirty days after submission shall constitute approval. * * *"

[Italics are ours here and elsewhere unless otherwise stated.]

The insurance policies issued in the instant case (R. 469; summarized Appendix 2 attached) which were alleged to be so "cunningly worded" as to be in themselves a fraud (R. 8)—and upon which the conviction rests—were all submitted to and approved by the Illinois Insurance Department, as required by the above-quoted section of the state statute (R. 171-2). In fact, the original Security Policy issued in 1939 was drawn by an independent actuary from forms in use by other companies, as suggested by the Illinois Department of Insurance (R. 171).

Section 149 of the Illinois Insurance Code relating to advertising matter, reads as follows (Ch. 73, Ill. R. S. Par. 761):

"(1) No company * * * and no officer, director, agent, clerk or employee thereof * * * or any other person, shall make, issue or circulate * * * any * * * illustration, circular, or verbal or written statement of any sort misrepresenting the terms of any policy issued or to be issued by it or any other company or the benefits or advantages promised thereby * * *.

"(4) Any * * * person who violates any of the provisions of this section * * * shall be required to pay a penalty of not less than one hundred dollars, nor more than one thousand dollars. * * *."

All advertising matter circulated or published and here involved was subject to the foregoing statute, and if it was misleading, it was the duty of the state authorities so to find, and to prosecute the offenders for publishing it.

That the State Insurance Department was mindful of that duty is evidenced by its letter of November 27, 1940,

approving certain samples of advertising matter submitted, and concluding with the admonition that the Department was not "waiving any of its duties with respect to the enforcement of the provisions of the Illinois Insurance Code concerning advertising which misrepresents the terms of the policies advertised" (R. 764-5).

In many instances, the advertising matter thereafter circulated and published differed from the samples referred to in the last-mentioned letter from the State Department, in that the advertising did not characterize certain accidents for which benefits were payable as "public carrier accidents" or refer specifically to minimum as well as to maximum benefits payable.

The advertisements did, however, as suggested by the Illinois Insurance Department, refer the reader to the policies advertised for information as to specific limitations, and tendered the policies for examination before their final acceptance. Most of the so-called "puffing" statements to which objection was made in the course of the trial were in the circular letters approved (R. 760-764).

A detailed review of the advertising matter is not called for here. A summary of the advertising with particular reference to the comments thereon in the opinion of the Court of Appeals, is set forth in Appendix 3 attached.

Despite close supervision of the business for the entire period up to the return of the indictment, the State Department of Insurance made no complaint as to the advertising.

From 1941, through 1948, the Illinois Insurance Department made periodic examinations of the business of the defendant Insurance Company and of its predecessor companies, and filed exhaustive reports covering every phase of that business, with extensive comments and suggestions thereon (R. 767-842).

Notwithstanding the admitted duty of the Department of Insurance to review the advertising matter, there is no adverse comment thereon in any report. The last report, filed on November 22, 1948, after return of this indictment, comments favorably on the Company's reserves and operations and concludes with the statement that "policy claims appear to be paid promptly and in accordance with policy provisions" (R. 825).

It is thus a fair inference that the advertising matter, as well as the insurance policies, was approved by the State authorities. But whether approved or not, the advertising, as well as all other phases of the business, was admittedly subject to state supervision and control.

And even if the policies and advertising were misleading and fraudulent, the offense was one for the state authorities to pass on and to punish. Whether or not the Petitioners had issued deceptive policies or advertising and if so, what their punishment should be therefor, were for the state authorities to determine. The federal statute, and the penalty imposed thereby for the fraud committed, could not be substituted for the state statute, and for the penalty imposed thereby, without impairing and superseding the state statute.

If, as we contend, the McCarran Act should be construed to prohibit that result, then the judgment below cannot stand.

**Questions of Federal Law Involved in Determining the Sufficiency of the Conspiracy Count.**

The indictment has 18 counts. The first count charges that the three Petitioners jointly devised a scheme to defraud policyholders, or prospective policyholders by issuance of deceptive insurance policies and advertising matter and in execution of the scheme, Petitioners sent or received

through the mails a communication to or from the supposed victim. Each of the next 16 counts adopts the allegations of the first count as to the scheme and alleges a different mailing (R. 2-16).

The 18th Count also adopts the first count by reference and charges that the joinder between the parties to devise the scheme is also a conspiracy separately punishable (R. 16-19).

The indictment was returned on September 10, 1948. Fifteen so-called overt acts are charged, all of which, except the last four, were committed more than three years before the return of the indictment. The supposed overt acts referred to (R. 17-19) are thus summarized:

(1-2) On October 14, 1938, the incorporation of Arcadia Mutual Casualty Company and election of Sylvanus as director.

(3) On October 14, 1940, approval by the State of the Security Policy, Form L-102.

(4) On May 1, 1942, opening of insurance company office at 221 North La Salle Street, Chicago.

(5) On December 18, 1943, purchase of $1,091 in guaranty fund certificates by defendant Voyle Clark Johnson.

(6) On December 18, 1943, purchase of $860 in guaranty fund certificates by defendant Sylvanus.

(7-8) On February 24, 1944, execution of agency contract with defendant Johnson and receipt of premiums by him thereafter.

(9-11) On December 29, 1944, and again on March 29, 1945, and again on April 23, 1945, the purchase by Johnson of guaranty fund certificates, totaling $19,909.

(12) On October 1, 1945, incorporation of Arcadia Life and Casualty Company by Sylvanus.

(13) On October 1, 1945, election of Sylvanus as a director in that company.

(14) On January 1, 1947, incorporation of defendant Arcadia National Insurance Company.

(15) On January 1, 1947, election of Sylvanus as a director in that company.

None of the alleged overt acts is sufficient to support a conspiracy charge, because none commits the supposed conspirator to the criminal act alleged to have been contemplated. But if the 3-year statute of limitations applies, none but the last four acts could be considered in any event, and each of them is insufficient to constitute an "overt act".

The Court of Appeals held, citing *U. S.* v. *Cohen*, 145 Fed. 2d 82 (CCA 2) that the Statute of Limitations did not bar prosecution on the Conspiracy Count, even if there was no allegation of a sufficient overt act occurring within 3 years before the indictment (R. 931).

That holding is contrary to the decision of this Court in *Fiswick* v. *U. S.*, 329 U. S. 211 (216-7).

The decision of this question is important because the Judge charged the jury that if a conspiracy was established and the jury found "beyond any reasonable doubt that any of the overt acts described in the indictment took place either prior to or during said defendants' connection with the conspiracy" the jury must find the defendants guilty (R. 371).

A separate motion was made to dismiss the conspiracy count (R. 155, 269-270) so that the point was properly raised.

## The Basis on Which the Jurisdiction of This Court Rests.

The jurisdiction of the Supreme Court of the United States in this case is derived from Section 1254 (a), Title 28, U. S. Code, conferring jurisdiction on this Court to

issue writs of certiorari to review decisions of the United States Courts of Appeal.

The decision sought to be reviewed rests wholly on federal law, and the questions raised are as to the correct construction of the federal statutes involved.

Statements of the questions presented and of the reasons why writ of certiorari should be issued are set forth in the next two subdivisions of this petition.

## The Questions Presented.

1. The first question presented is whether or not, under a correct construction and application of the McCarran Act (Sec. 1011-1015, Title 15, U. S. C.) this prosecution under the Acts of Congress, relating to mail frauds and conspiracies (Secs. 1341 and 371, formerly Secs. 338 and 88, Title 18, U. S. C.) can be maintained, in view of the fact that the fraudulent scheme charged involves only the issuance of insurance policies and the circulation of advertising matter in the conduct of an insurance business regulated by Illinois law.

As a corollary, a question is raised as to which of the following conflicting decisions as to construction and application of the McCarran Act is correct:

(a) The decision of the Court of Appeals for the Seventh Circuit (R. 920-1), in the instant case, holding that the McCarran Act does not remove from purview of a general federal statute (in this case the statute relating to mail fraud and conspiracy) passed pursuant to constitutional authority, acts performed in the conduct of a state-regulated insurance business; **or**

(b) The contrary decision of the Court of Appeals for the Eighth Circuit in *North Little Rock Trans. Co.* v. *Casualty Reciprocal Exchange,* 181 Fed. (2) 174 (Cer. Den. 340 U. S. 823) holding that the McCarran Act was a bar to a suit to enforce the penal

provisions of a general federal statute (in that case the Sherman Act—also passed purusant to constitutional authority) for acts in the conduct of an insurance business that would otherwise have been a violation of that Act.

The question as to the construction and application of the McCarran Act was raised in the District Court by motion to strike the indictment (R. 25) and by motions for acquittal at the close of the Government's evidence and at the close of all the evidence (R. 155-7; 269-70); and in the Court of Appeals on appeal from the judgment of conviction (R. 876).

2. The second question involved is as to whether or not, under a correct construction of the federal statute, relating to conspiracies, (Sec. 371, formerly Sec. 88, Title 18, U. S. C.) and of the applicable statute of limitations (Sec. 3282, Title 15, U. S. C.), the alleged overt acts set forth in the conspiracy count are sufficient to sustain a prosecution under that statute. This question was raised in the District Court on the motion to dismiss the conspiracy count at the close of the Government's evidence (R. 155) and at the close of all the evidence (R. 270) on the ground that a conspiracy was not shown.

3. The third question raised is as to which of the following conflicting decisions is correct:

(a) The decision of the Court of Appeals for the Seventh Circuit in the instant case (R. 936) that it is not the duty of an insured to read his policy in order to ascertain the conditions contained therein, even though the advertising complained of tenders the policy to him for examination before acceptance, and refers to the policy for the specific limitations and conditions affecting the insurance; or

(b) The decision of the Court of Appeals for the District of Columbia in *Bowers* v. *Washington Times Co.*, 65 Fed. (2) 200, applying a contrary principle in a civil suit to recover the maximum benefit advertised.

The question as to the duty of the insured to read his policy and as to the extent to which he was bound by the policy provisions was raised on motions for acquittal at the close of the Government's evidence and at the close of all the evidence (R. 155-7; 269-70), and also by instruction tendered and refused that it is the duty of the insured to read his policy of insurance, to ascertain the conditions therein contained, and if such policy is unsatisfactory, to object thereto at the time (R. 273).

The question was raised in the Court of Appeals on appeal from the judgment of conviction (R. 876-7; 883).

## Reasons Relied on for Allowance of the Writ of Certiorari.

We submit that a writ of certiorari should be granted in this case for the following reasons:

1. *The Question of Construction of the McCarran Act.*

The decision of the Court of Appeals rests on a construction of the McCarran Act. The opinion admits that the right to determine what policies may be issued, what advertising may be published and circulated, whether or not the policies or advertising are misleading, and what the punishment shall be if they are misleading, are all exclusively with the state (R. 920-1).

The Court holds, however, that if coupled with the issuance of the policies and advertising, there is a use of the mails, the Federal Court may determine independently and without regard to state jurisdiction whether or not the policies and advertising are fraudulent and whether or not the issuer thereof should be punished (R. 921).

The reason give by the Court is that Congress has power under the Constitution to regulate the mails, and hence a statute enacted in exercise of that power should not be limited in its operation because of jurisdiction of the state over the subject matter of the fraud (R. 921).

The reason stated ignores both the wording and the intent of the McCarran Act.

Every valid act of Congress is passed in the exercise of some Constitutional power. If Congress so desires, it may extend that power over the conduct of a state-regulated insurance business. But the McCarran Act declares, that unless Congress, in a statute exercising its consti-

tutional power, sets forth that the statute shall apply to the conduct of an insurance business, it will not be extended to that business.

The title of the McCarran Act is "*An act to express the intent of Congress with reference to the regulation of the business of insurance.*" The inention expressed is that the regulation shall be left wholly to the states, and thus to except from the purview of any federal statute not made expressly applicable to the insurance business, all matters pertaining to the conduct of that business that are subject to state regulation.

The statute relating to mail frauds does not, by its terms, apply to the acts performed in the conduct of an insurance business, and hence under a literal construction of the McCarran Act, could not be construed to cover those acts.

In holding to the contrary, the Court of Appeals held, in effect, that, despite the McCarran Act no one carrying on an insurance business can rely on the state law regulating that business, or on the directives of the state authorities acting thereunder, for determination of what policies or advertising he may issue or circulate.

The question of federal law raised is important and has not been determined by this Court. It is in the public interest that it be determined.

2. *Conflict Between the Decision in the Instant Case and the Decision of the Court of Appeals for the Eighth Circuit Construing the McCarran Act.*

The construction of the McCarran Act in the instant case is based on a principle contrary to that on which the decision was based in *North Little Rock Transp. Co.* v. *Casualty Reciprocal Exchange,* 181 Fed. (2) 174. In that case, North Little Rock Transportation Co. sued the Casualty Reciprocal Exchange for triple damages under the Sher-

man Act. The defendants had clearly engaged in a combination in restraint of interstate commerce within the meaning of the Sherman Act and the principle laid down in *U. S.* v. *Southeastern Underwriters Assn.*, 322 U. S. 533, holding insurance to be interstate commerce.

The defense was that the conduct complained of was regulated by the laws of Arkansas, "and that because of the Act of March 9, 1945 * * * 15 U. S. C. A. Secs. 1011-1015, known as the McCarran Act, the Sherman Act did not apply to the insurance business so far as it is regulated by the state."

In sustaining that defense, the Court said (181 Fed. (2d), at p. 176):

> "The purpose of the McCarran Act was to permit the States to continue the regulation of the business of insurance, unhampered, to the extent provided by the Act, by federal legislation relating to interstate commerce."

The same principle would apply to "federal legislation" relating to use of the mails. But the Court of Appeals for the Seventh Circuit refused to follow that principle here.

There is, therefore, a conflict between the decision of the Circuit Court of Appeals in the instant case and the decision of the Eighth Circuit Court of Appeals in the *North Little Rock Transportation Co.* case, on substantially the same question of construction of the McCarran Act, and for that reason, this Court should grant the writ.

This is another reason for granting a writ of certiorari.

As the Court said in *Jerome* v. *U. S.*, 318 U. S. 101 (102) in stating the reason for granting a writ where the question was whether the word "felony" as used in Act of Congress applied to a State, as well as to a federal offense:

> "We granted a petition for a writ of certiorari because of the importance of the problem in the administration of justice and because of the diversity of views

which have developed as respects the meaning of felony."

3. *Question of Construction of the Statute Relating to Conspiracies as to Sufficiency of the Overt Acts Charged and the Application of the Statute of Limitations Thereto.*

This question has been fully stated at pages 11-13 and 15, *ante*. We contend that none of the overt acts is sufficient to commit the actor to the perpetration of the contemplated crime of using the mails to execute the fraudulent scheme so that he could not withdraw and be innocent. And this is particularly true if only the acts within the three-year period prior to the indictment are considered.

In view of the tendency to use the conspiracy statute as a means of charging the same offense a second time, and of relieving the prosecution from the necessity of adhering to rules of evidence in proving it, the question raised is important and should be passed upon.

4. *The Conflict in the Decisions of the Circuit Courts of Appeals With Respect to the Obligation of a Policyholder to Read His Policy in Order to Determine the Conditions and Limitations Thereof.*

This question is also stated at pages 15-16, *ante*.

The opinion of the Court of Appeals in the case at bar holds that there is no conflict in principle between this case and *Bowers* v. *Washington Times*, 65 Fed. (2) 200, decided by the Court of Appeals for the District of Columbia, because, as the opinion states, the last-mentioned case was a civil case (R. 936).

The distinction is not sound because in both cases the question was whether the prospective policyholder can rely on the advertising to the exclusion of the policy, notwithstanding the fact that the advertising refers the reader to the policy for a specific statement of the limitations and conditions attached to payment of the risk. The adver-

tising in the *Washington Times* case was similar to that most complained of in the instant case, in that it stated the maximum benefit payable without stating the limitations and conditions under which the policyholder would receive it, and thus left the policyholder to read the policy itself for determination of what those limitations were. The decision in the *Washington Times* case that the policyholder was bound by the policy, at least insofar as it was supplementary to and not in conflict with the advertising (which was true in every instance in the case at bar) was based on a principle exactly contrary to that applied here, where the jury was instructed that a policyholder was not even required to read his policy.

The conflict in decisions on this point is an additional reason why this Court should grant this petition for a writ of certiorari.

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For the reasons above stated Petitioners pray that a writ of certiorari be issued by this Court for review of the judgments entered in this case on December 1, 1951, by the Court of Appeals for the Seventh Circuit.

ALFRED SYLVANUS, ARCADIA NATIONAL INSURANCE COMPANY, and VOYLE CLARK JOHNSON,

*Petitioners,*

By ROGER SHERMAN,
HENRY F. TENNEY,
S. ASHLEY GUTHRIE,
*Attorneys for Petitioners.*

S. ASHLEY GUTHRIE,
*Of Counsel.*

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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The opinion of the Court of Appeals is not yet reported. It is set forth in full at pages 919 to 937 of the Record.

The jurisdiction of this Court is invoked under Section 1254(a), Title 28, United States Code, conferring jurisdiction on this Court to issue writs of certiorari to review decisions of the United States Circuit Court of Appeals.

The essential points of the case have been sufficiently stated in the foregoing petition for writ of certiorari and in the appendices hereto.

### Specification of Errors.

We rely here on the following assignment of error:

1. The Court of Appeals erred in sustaining the action of the trial Court in overruling the defendants' motion to dismiss the indictment, made on the following ground: The conduct of the insurance business in Illinois, is regulated exclusively by state law. Under the McCarran Act (Secs. 1011-1015, Title 15, U. S. Code), the laws of Congress on which this prosecution is based, do not apply to the acts alleged in the indictment. (R. 25.)

2. The Court of Appeals erred in sustaining the action of the trial Court in not granting defendants' motions for acquittal at the end of the Government's evidence and at the end of all the evidence. The motions should have been granted because:

(a) The evidence did not show that the defendants had any fraudulent or criminal intent.

(b) The insurance policies complained of are not ambiguous or misleading. They were prepared by an independent actuary and are in form and substance as specified and approved under the Illinois law.

(c) The advertisements published or circulated in connection with the issuance of the policies did not make the issuance of the policies fraudulent. The advertisements were substantially in form approved by the State Department of Insurance, but in any event they did not misstate any material fact. They tendered and referred to the policies for the specific provisions thereof with promise of refund if the policies were unsatisfactory.

3. The evidence does not sustain the conviction of any of the defendants for the conspiracy charged in the eighteenth count and the separate motions to dismiss or for acquittal on that count made at the close of the Government's evidence, and at the close of all the evidence should have been granted, because:

(a) The "conspiracy" set forth in the eighteenth count is the same as the "scheme to defraud" set forth in the earlier counts. The conspiracy count cannot stand, if the other counts fall.

(b) The overt acts charged and relied on do not bear any proximate relation to attainment of the object of the conspiracy and do not sustain conviction on the conspiracy count.

4. The Court of Appeals erred in sustaining the ruling of the trial Court that a prospective policyholder was not required to read his policy to determine the terms and conditions thereof, and was not bound by what the policy would have disclosed by reading it, and in refusing a tendered instruction to the jury to that effect.

## I.

## THE MOTION TO DISMISS THE INDICTMENT SHOULD HAVE BEEN SUSTAINED BECAUSE THIS PROSECUTION IS BARRED BY THE McCARRAN ACT.

### A.

THE SCHEME TO DEFRAUD, CHARGED IN THE INDICTMENT, INVOLVES ONLY THE ISSUANCE OF INSURANCE POLICIES AND ADVERTISING MATTER SUBJECT TO REGULATIONS IMPOSED BY STATE LAW; UNDER THE McCARRAN ACT THE MAIL FRAUD STATUTE CANNOT BE CONSTRUED TO COVER THAT SCHEME, BECAUSE, IF SO CONSTRUED, IT WOULD INVALIDATE, IMPAIR, OR SUPERSEDE THE STATE LAW.

The ground on which the Court holds that the McCarran Act does not bar this prosecution is thus stated in the opinion (R. 921):

> "* * * it cannot be properly said that this indictment has to do with the regulation of insurance business in Illinois. Rather it has to do with the question of whether defendants have used the mails in pursuance *of a scheme so to manipulate their authorized regulated business in Illinois as to result in fraudulent deception of its prospective policy holders. The charge* is not that the corporate charter should be ignored or that the administrative officers of Illinois may not perform their statutory duties and supervise and regulate the company's insurance business in Illinois, but *goes to the use of the mails, over which the Congress has, by the Constitution, paramount power and authority.*" (Italics are ours here and elsewhere unless otherwise stated)

We submit that the ground stated is not sound, and that the decision based on it should not be adhered to.

It is true that Congress has power to control the mails, and may exercise that power along with other constitutional powers, so as to control a state-regulated insurance business, provided Congress expressly elects to do so. But Congress, by the McCarran Act (Title 15, Sec. 1011-2, U. S. Code, Mar. 9, 1945) has elected not to do so. Instead, it has provided that a general statute shall not be extended to apply to a state-regulated insurance business, unless the intention so to extend it is specifically set forth in the statute.

The McCarran Act provides:

(1) That "the continued regulation and taxation by the several states of the business of insurance is in the public interest, * * *;"

(2) That "the business of insurance and every person engaged therein shall be subject to the laws of the several states"; and

(3) That "no act of Congress shall be construed to invalidate, impair or supersede any law enacted by any state for the purpose of regulating the business of insurance, * * * unless such Act specifically relates to the business of insurance: * * *"

The McCarran Act thus creates an exception to every general statute theretofore or thereafter passed by Congress (whether in exercise of its power to control the mails, or in the exercise of its power to control interstate commerce, as in the Sherman Act, or in the exercise of any other power), removing from the purview of such

statute all matters pertaining to the conduct of a state-regulated insurance business, unless the intent that the statute shall apply to that business is expressly stated therein.

The words, *"invalidate," "impair,"* and *"supersede,"* are thus defined in Webster's Dictionary:

> *Invalidate*—to render invalid or null; to weaken or destroy the force of.
>
> *Impair*—* * * to diminish in quantity, value or strength.
>
> *Supersede*—to cause to be set aside, forced out of use * * * to take the place, room, or position of; to replace.

By use of the three words, the McCarran Act provided that no federal statute (unless stated to be applicable to the insurance business) should be extended in its application so as to weaken, or lessen the value of, or take the place of, any provision of "any law enacted by any state for the purpose of regulating the business of insurance."

The Illinois Insurance Code is a state law enacted "for the purpose of regulating the business of insurance," and is directly within the exception created by the McCarran Act to the application of all general federal statutes.

The Illinois Code requires policies and advertising to conform to specified standards, and provides penalties for non-conformance with those standards. The pertinent provisions of the Code are set forth in Appendix 1, attached hereto.

Section 143 of the Illinois Insurance Code (Ch. 73, Ill. R. S., Par. 967), prohibiting the issuance of any policy not approved by the State Insurance Department, or containing any misleading statement or unfair condition, and Section 149 of the Code (Ch. 73, Ill. R. S., Par. 761) pro-

hibiting circulation of misleading advertising and providing penalties therefor, are set forth at pages 8 and 9, *ante*.

Section 401 (Ch. 73, Ill. R. S., Par. 1013) provides for supervision and periodic examinations of the conduct of the business by the Director of Insurance; and Section 446 (Ch. 73, Ill. R. S., Par. 1058) provides penalties for any violation of the law for which no other specific penalty is provided in the Code.

The statute relating to mail frauds cannot, under the McCarran Act, be extended so as to weaken the force of, or to render inapplicable, or to take the place of, any of the foregoing regulations of The Illinois Insurance Code with respect to policies and advertising, and with respect to the penalties prescribed for violation of those regulations.

This is so, whether or not the Illinois law has been violated or whether or not the Federal Court deems the penalty prescribed by the state law to be inadequate.

If the Illinois law has not been violated, then a conviction under the federal statute would result in substitution of the federal regulation for the state regulation and in the imposition of a punishment by the Federal Court for acts that are authorized under the state law. And if the Illinois law has been violated, such conviction would result in an imposition of a federal penalty for the violation, in place of or in addition to the state penalty, and would constitute a like assertion by the Federal Court of jurisdiction over a transaction which the McCarran Act declares, as a matter of public policy, is left wholly to the control and jurisdiction of the states. In either event, the force of the Illinois law, relating to the conduct of an insurance business, is destroyed and that law is impaired and superseded by the federal statute.

B.

A Conviction Under the Mail Fraud Statute Necessarily Involves An Assumption of Federal Jurisdiction Over the Conduct of An Insurance Business in Illinois, and Thus Renders Ineffective the Regulations Imposed by State Law Relating Thereto.

It is said, in answer to the foregoing argument, that the conviction under the federal statute is for use of the mails and not for the fraudulent scheme.

That is not true under any fair analysis of the issues.

The crime defined in the mail fraud statute comprises two elements: (1) the devising of "a scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent promises"; and (2) the use of the mails to execute the scheme (Sec. 1341, formerly Sec. 338, Title 18, U. S. C.).

While it has been said that the use of the mails is "the gist of the offense," in the sense that it gives the Federal Court jurisdiction, the scheme or artifice to defraud is the essential element, the very basis of the crime.

As said by the Court of Appeals for the Seventh Circuit, in *Worthington* v. *U. S.*, 64 Fed. (2) 936 (941):

> "In a mail fraud action such as the one we are considering, a fraudulent scheme is an essential element of the crime. While federal authority is exercised because of the use of the mails by the wrongdoer, the wrong—namely, the fraudulent scheme—is an essential and often is the only controverted issue involved."

The scheme to defraud, charged in the indictment, consists of (1) the issuance of insurance policies alleged to have been "composed in an ambiguous and confusing manner" and to be "cunningly worded, arranged and set up,"

so as to be in themselves misleading and fraudulent; and (2) the circulation of misleading advertisements with respect to those policies (R. 5-10).

In order to sustain a conviction on any of the substantive counts, or on the conspiracy count, the indictment must charge, and the evidence must prove, the existence of this fraudulent scheme, namely, that the policies and the advertising relating to them, issued or contemplated, were fraudulent and misleading. Otherwise there would be no scheme to defraud that could be executed by the use of the mails or with respect to which any conspiracy could exist.

The question as to whether a fraudulent scheme was charged and proved was the principal issue in this case. It is the issue to which all the evidence, argument and the review on appeal were directed. If (because of the McCarran Act) the mail fraud statute does not extend to that scheme, the indictment does not state a case.

The opinion of the Court of Appeals cites *Badders* v. *U. S.*, 240 U. S. 391 and *O'Hara* v. *U. S.*, 129 Fed. 551 (C. A. 6), on the proposition that a prosecution under the mail fraud statute may be maintained even though the scheme charged relates to transactions regulated or forbidden by state law (R. 921).

Neither case is in point.

There is no question but that (in the absence of a statute like the McCarran Act taking the transaction in question out of the purview of general federal statutes) one may be punished under the federal law for performing an act in a transaction that is also subject to state law, and for which he may also be punished under the state law.

But it has long been recognized that it is contrary to sound public policy to extend a federal statute to matters

primarily subject to state jurisdiction, if such construction of the federal statute can be avoided.

*Jerome* v. *U. S.*, 318 U. S. 101 (105).

And in *Hendrey* v. *U. S.*, 233 Fed. 5 (7-8) (C. C. A. 6), decided by the same Court that decided the *O'Hara* case, the Court reluctantly held that the fact that the alleged fraudulent scheme was subject to regulation by, and was an offense punishable under, the state banking laws, was not a defense against a prosecution under the mail fraud statute. The Court stated that the liability to double punishment might well be against sound public policy, but that only Congress could remedy that situation. As to this, the Court said (pp. 7-8):

> "* * * the practical effect of this situation is to call upon the laws or courts of the United States to punish citizens of a state for violating the laws of that state * * *. If it be true, as it is sometimes thought, that there was no deliberate intent to extend so far the federal criminal jurisdiction, *restriction can come only from Congress.*"

The McCarran Act supplies the restriction from Congress suggested in the above quotation, necessary to prevent conviction under a general federal statute for acts in the conduct of an insurance business subject to state law, and for which the action is punishable under the state law if any intent to mislead or defraud a prospective policy holder is shown. As Congress declares in the McCarran Act, "it is in the public interest" to leave the control of the insurance business to the states.

If the Illinois law is not severe enough, that gives no right to the federal court to interfere. It is a matter to be addressed to the legislature for correction.

C.

THE McCARRAN ACT IS NOT RESTRICTED IN ITS OPERATION TO STATUTES PASSED UNDER THE COMMERCE CLAUSE; BY ITS TERMS IT EXCLUDES FROM APPLICATION OF ALL ACTS OF CONGRESS (NOT EXPRESSLY RELATING TO INSURANCE) MATTERS CONNECTED WITH A STATE-REGULATED INSURANCE BUSINESS.

It was argued by the Government in the District Court that the "Acts of Congress" which the McCarran Act declares shall not apply to the insurance business are intended to include only Acts of Congress enacted under the commerce clause of the Constitution.

There is no warrant in the statute for such restrictive interpretation.

The necessity for legislation to prevent federal control of the insurance business became apparent when this Court held, in *U. S.* v. *Southeastern Underwriters*, 322 U. S. 533, that transactions across State lines in the conduct of an insurance business were interstate commerce and were therefore subject to the criminal provisions of the Sherman Act, even though the conduct of the business was subject to state regulation and control.

The effect of the McCarran Act was to remove from the purview of both the criminal and civil provisions of the Sherman Act, all transactions connected with a state-regulated insurance business; but the McCarran Act was not limited in its application to the Sherman Act, or other acts passed under the commerce clause.

An act of Congress passed under a constitutional grant of authority to regulate the mails, or under any other constitutional grant, may interfere with the conduct of an insurance business to the same extent as an act of Congress passed under constitutional grant of authority to regulate interstate commerce. A criminal prosecution un-

der the mail fraud statute is as effective in nullifying and superseding the state law as is a similar prosecution under the Sherman Act.

The statutory language is clear and it is neither necessary nor proper to go into the legislative history or to the debates in Congress to determine its meaning or to engraft on the act a purpose or restriction not expressed in it.

> "The short answer is that there is no need to refer to the legislative history where the statutory language is clear."
>
> *Ex Parte Collett,* 337 U. S. 55 (61).

See also *Helvering* v. *City Bank Farmers Tr. Co.,* 296 U. S. 85 (89).

The legislative history, however, supports the conclusion that the McCarran Act is intended to prevent interference of all acts of Congress with state regulation of the insurance business.

As stated by the House Committee on Judiciary in its report recommending passage of the bill:

> "Already many insurance companies have refused, * * * to comply with * * * State regulations, on the ground that to do so, when such laws may subsequently be held unconstitutional in keeping with the precedent-smashing decision in the *Southeastern Underwriters* case, will subject insurance executives to both civil and criminal prosecutions * * *.
>
> The committee has therefore given immediate consideration to S. 340, together with a similar measure, H. R. 1973, so that the several States may know that Congress desires to protect the continued regulation and taxation of the business of insurance by the several States, and thus enables insurance companies to comply with State laws." U. S. Code Congressional Service, 1945, p. 671.

There is nothing in the report indicating an intent to restrict the meaning of "Acts of Congress," which Section 1012 declares are not to interfere with state insurance regulations, to Acts of Congress enacted under the commerce clause.

The McCarran Act made no distinction, but provided that "*no Act of Congress*" (unless it expressly relates to insurance) should be extended so as to apply directly or indirectly to any transaction involved in the conduct of a state-regulated insurance business.

## D.

### The Question of Federal Law Involved in Construction of the McCarran Act Has Not Been, But Should Be, Decided by This Court; and the Conflict Between the Decisions of the Circuit Courts of Appeal Should Be Resolved.

The McCarran Act first came before this Court for construction in *Prudential Insurance Co.* v. *Benjamin*, 328 U. S. 408 in which the Prudential Insurance Company attacked the validity of a South Carolina statute regulating the conduct of the business of insurance and imposing a tax on this business in South Carolina, even though the transaction extended across state lines. The Court sustained the South Carolina statute; held the McCarran Act constitutional; and further held that the effect of the act was to confer power on the state to regulate and tax insurance transactions even though interstate in character.

The only other case involving construction of the McCarran Act, here important, is *North Little Rock Trans. Co.* v. *Casualty Reciprocal Exchange*, 181 Fed. (2) 174, abstracted at pages 18-19, *ante*. In that case, the Court held the McCarran Act was effective to remove insurance transactions from the purview of the Sherman Act and

to bar a suit under that act for treble damages for injury done to the plaintiff by combination between insurance underwriters permitted under the state law.

The question at issue in the last-cited case is not essentially different from that in the case a bar—if we substitute "mail fraud statute" for the "Sherman Act." But the decisions are exactly contrary.

The decision in the *North Little Rock Trans.* case is more in line with the principles applied by this Court in construing similar statutes.

Thus in *Connecticut Light and Power Co.* v. *Federal Power Commission,* 324 U. S. 515, this Court reversed a decision of the Court of Appeals holding accounting practices of the defendant utility subject to the jurisdiction of the Federal Power Commission, despite a statutory exemption of State regulated utilities from the Act there in question. As to this, the Court said (pp. 528, 532):

> "It is hard for us to believe that Congress meant us to read 'shall have jurisdiction' where it had carefully written 'but shall not have jurisdiction.' The command 'thou shalt not' is usually rendered as to forbid and we think here it was employed without subtlety or contortion and in its usual sense. * * * 'Where a federal agency is authorized to invoke an overriding federal power except in certain prescribed situations and then to leave the problem to traditional state control, the existence of federal authority to act should appear affirmatively and not rest on inference alone'."

And see also:

> *Panhandle Eastern Pipeline Company* v. *Public Service Commission,* 332 U. S. 507.

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We submit that the question as to the construction of the McCarran Act should be passed upon by this Court;

that under a proper construction of that act the issuance or contemplated issuance of insurance policies and advertising matter, charged in the indictment to comprise a fraudulent scheme, are excluded from the purview of the statutes relating to mail frauds and conspiracies; and hence that the motion to dismiss the indictment should have been sustained.

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It follows that the motions for acquittal should also have been granted because of the insufficiency of the indictment and because approval by state authorities of the policies issued is conclusive, that their issuance was not contrary to public policy and that they were neither unfair nor deceptive.

## II.

## NONE OF THE SUPPOSED OVERT ACTS SET FORTH IN THE CONSPIRACY COUNT IS SUFFICIENT TO SUSTAIN THE CHARGE OF CONSPIRACY AND THE MOTIONS TO DISMISS OR FOR ACQUITTAL ON THAT COUNT SHOULD HAVE BEEN GRANTED.

The act relating to conspiracies require, as a necessary element of the offense, that one of the parties to the conspiracy "do any [an] act to effect the object of the conspiracy." (Sec. 371, Title 18, U. S. C.)

The purpose of the requirement of an overt act is thus stated:

> "The provision of the statute, that there must be an act done to effect the object of the conspiracy, merely affords a *locus poenitentiae*, so that before the act is done either one or all of the parties may abandon their design, and thus avoid the penalty prescribed by the statute."
>
> *U. S.* v. *Britton*, 108 U. S. 199 (204-5).

The overt act must be some positive, active step "to effect the object of the conspiracy."

*U. S.* v. *McLaughlin,* 169 Fed. 302 (307) (D. C. D., Minn.).

In practice, the only overt act that could so tend to *reflect* the design to use the mails, is an actual use of the mails. Hence, it is almost invariably a use of the mails that is charged as an overt act in a count for conspiracy to use the mails to defraud. For example, see *Hendrey* v. *U. S.,* 233 Fed. 5 (12) C. A. 6); *Brady* v. *U. S.,* 24 Fed. (2) 399 (404-5) (C. A. 8).

The acts charged in the indictment here to be "overt acts" (R. 17-18) are set forth at pages 12-13, *ante.* They may be thus summarized:

Acts performed more than 3 years prior to the indictment:

1-4: The organization of Arcadia Mutual Casualty Company; the appointment of Sylvanus as director; the procuring of authorization to do business; and the establishment of an office to do business.

5-11: The entry of the company into the insurance business; the appointment of Johnson as agent; the receipt of premiums; and the making of subscriptions to the guaranty fund required by statute to finance the business.

Acts performed less than 3 years prior to the indictment:

12-15: The organization of the successor insurance companies and the appointment of Sylvanus as officer and director.

None of the acts referred to could be classed as an irrevocable step toward commission of the crime of using the mails to defraud.

But in any event, only the last four acts charged are within the three-year limitation period (Sec. 3282, Title 18, U. S. C.) and since they are insufficient, the entire count falls.

*Fiswick* v. *United States*, 329 U. S. 211 (216-7).

The decision by the Court of Appeals in the instant case (R. 931) that the three-year limitation does not apply, is in conflict with the decision in the *Fiswick* case last cited.

The question was raised on separate motions for judgment on the conspiracy count (R. 155, 269-270). The motions were overruled and the District Judge instructed the jury that if they found that the defendants (Petitioners) committed any of the acts charged, the jury should convict them (R. 371).

The conspiracy charged in the 18th Count is hardly distinguishable from the substantive offense charged in each of the other counts.

The use of a loose conspiracy count to relieve the prosecutor from restrictions imposed by the hearsay rule and thus to procure a conviction, has been strongly condemned as a threat to the fair administration of justice.

*Krulewitch* v. *United States*, 336 U. S. 440 (445-6).
*U. S.* v. *Rosenblum*, 176 Fed. (2) 321 (332) (C. C. A. 7).

We submit that the Court should pass on the question here raised and that the conspiracy count cannot stand.

If that count and the evidence offered under it had been excluded, the case presented would have been essentially different, and there may have been no conviction on the other counts.

## III.

## THE DISTRICT COURT AND THE COURT OF APPEALS SHOULD HAVE HELD THAT IT WAS THE DUTY OF THE INSURED TO READ HIS POLICY IN ORDER TO ASCERTAIN THE CONDITIONS CONTAINED THEREIN, AND THE JURORS SHOULD HAVE BEEN INSTRUCTED ACCORDINGLY.

The Government's fundamental objection to the circular letters and advertisements is that they state maximum benefits without setting forth the conditions and limitations that may reduce those benefits or affect the risks covered.

But the advertisements or letters do not purport to include all terms of the policies. The reader is referred to the policy for specification and amplification. The applicant is bound by the limitations in the policy, and if the policy fairly states them, there is no fraud.

Thus, in *Bowers* v. *Washington Times Co.*, 65 Fed. (2) 200 (C. A. D. C.), the advertisement read as follows:

> "One dollar provides protection for $10,000 to subscribers of the Washington Times. * * * For loss of life, $10,000. For loss of both eyes, $10,000. * * * With other provisions."

The policy provided (as does the Security policy here) that the maximum benefit (in that case $10,000) was to be paid on the insured's death only if caused by wrecking of a railroad passenger car, steamship, ferry, street car, elevated or subway car. Otherwise the indemnity for death would be $500.

The insured was killed in an automobile accident. The Court held that his beneficiary could recover only $500

and that there was no fraud in the advertising or in the policy. The Court said (p. 202):

> "The advertisement sets out in a prominent manner that the policy in question would contain other provisions. The insured was thereby notified that he should examine the policy in order to fully acquaint himself with its terms.
>
> It appears that the policy which was tendered to appellant after the death of decedent was of the standard type and form issued by the defendants in such transactions and referred to in the receipt which decedent received in his lifetime. There was no fraud or concealment in the character of the policy, such as to mislead any reasonably careful person."

The Court of Appeals in its opinion, in the instant case, refused to follow *Bowers* v. *Washington Times Co.* on the ground that that was a civil case (R. 936).

The distinction is not valid.

The suit in the *Bowers* case was not for recovery on the policy, but for recovery of the $10,000 indemnity advertised, which was greater than the amount payable in the policy for the particular loss sustained. The plaintiff denied (as here) that the insured did not have to read his policy, but could rely on the advertising. The suit was based on a fraud rather than on a contract. The question involved is the same as that involved in the case at bar, and the two decisions cannot be reconciled.

In view of the fact that the policies here had been approved by the State Department of Insurance, which had sole jurisdiction over them, it cannot be properly contended that they are deceptive or misleading or that their issuance showed the actual intent to defraud, that is essential to a conviction.

*Reilly* v. *Pinkus*, 338 U. S. 269 (276).

The question presented is important, and the Court

should resolve the difference between the decisions thereon by the Court of Appeals for the 7th Circuit in this case, and by the Court of Appeals for the District of Columbia in *Bowers* v. *Washington Times Co.*

If this question is resolved in favor of the Court of Appeals of the District of Columbia, it follows that the District Court erred in the instant case in not granting the motion for acquittal and in any event, in refusing to give to the jury the tendered instruction stating that it was the duty of the insured to read his policy and if it was unsatisfactory, to reject it (R. 273).

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We submit that the Court should grant a writ of certiorari in this case and that the decision of the Court of Appeals herein should be reversed.

Respectfully submitted,

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## APPENDICES.

Appendix 1—

Excerpts from The Illinois Insurance Code, pages i-vii.

Appendix 2—

Synopsis of Insurance Policies in Suit, pages viii-xiii.

Appendix 3—

The Advertising, pages xiv-xxvii.